

EAO8ADRF

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 ADREA, LLC,

4 Plaintiff,

5 v.

13 Cv. 4137 (JSR)

6 BARNES & NOBLE, INC.,
7 BARNESANDNOBLE.COM LLC, AND
8 NOOK MEDIA LLC,

9 Defendants.
-----x

10 October 24, 2014
11 9:00 a.m.

12 Before:

HON. JED S. RAKOFF

13 District Judge

14 APPEARANCES

15 PROSKAUER ROSE LLP
16 Attorneys for Plaintiff
17 BY: STEVEN M. BAUER
18 COLIN CABRAL
BRENDAN COX

19 ARNOLD & PORTER LLP
20 Attorneys for Defendants
21 BY: LOUIS S. EDERER
22 ALI R. SHARIFAHMADIAN
MICHAEL A. BERTA
23 YUE-HAN CHOW
24 SARAH BRACKNEY ARNI
25 SUSAN L. SHIN

EAO8ADRF

1 (Jury deliberations resumed; time noted: 9:00 a.m.)

2 (Jury not present; time noted: 1:15 p.m.)

3 THE COURT: This is Judge Rakoff. I understand we
4 have received a note from the jury. I will ask my law clerk
5 first to read the note itself.

6 LAW CLERK: "To the judge:

7 "The plaintiff bears the burden of proving the amount
8 of such charges by a preponderance of the credible evidence.

9 "Based on the instructions above and the fact that we
10 don't have plaintiff testimony, what should be considered our
11 role in coming up with estimating damages?"

12 THE COURT: When that was first read to me a few
13 minutes ago, I drafted a very first rough draft of a response,
14 which I will ask my law clerk to now read also into the record.

15 LAW CLERK: "To the jury: Although the plaintiff's
16 damages expert testimony was stricken, plaintiffs did introduce
17 some documentary evidence bearing on damages. In addition,
18 defendants' expert calculated what he believed would be
19 reasonable damages if infringement was found. In determining
20 damages, even though plaintiff bears the burden of proof, you
21 can still consider all evidence including any evidence
22 introduced by the defendants. Finally, if you find in the end
23 that, even taking account of all the evidence, plaintiff has
24 not carried its burden as to any amount of damages but has
25 nonetheless proved infringement, you should award the amount of

EAO8ADRF

1 zero dollars, which is known as nominal damages."

2 THE COURT: OK. Let me hear first from plaintiff's
3 counsel and then from defense counsel as to any suggestions,
4 corrections, additions, whatever, to that proposal.

5 MR. CABRAL: Thank you. This Colin Cabral on behalf
6 of plaintiff. Good afternoon.

7 THE COURT: Good afternoon.

8 MR. CABRAL: Plaintiff has three proposed, I guess,
9 changes or modifications. The first is a relatively simple
10 one. We would eliminate the word "some" in front of
11 documentary evidence bearing on damages.

12 THE COURT: That's fine. Let's eliminate that.

13 MR. CABRAL: The second would be after the sentence
14 referring to "in addition, defendants' expert calculated," so
15 forth, after the second full sentence, we would propose adding
16 a sentence that reflects the role of expert testimony under
17 703, something along the lines of expert testimony may be
18 considered, but is not necessary, or something to that effect.

19 THE COURT: I agree with that. I think it should
20 actually go earlier.

21 Celia, read me the first sentence again.

22 LAW CLERK: "Although the plaintiff's damages expert
23 testimony was stricken, plaintiffs did introduce documentary
24 evidence bearing on damages."

25 THE COURT: Let's start the sentence there. More

EAO8ADRF

1 generally, while expert testimony may be considered on the
2 issue of damages, it is not necessary for there to be expert
3 testimony on the issue of damages if there is sufficient other
4 evidence to provide a basis for a reasonable calculation of
5 damages.

6 Let me ask plaintiff's counsel. That's the point you
7 wanted to make, yes?

8 MR. CABRAL: That's right, your Honor.

9 THE COURT: You have a third point?

10 MR. CABRAL: Yes, your Honor. The third point comes
11 at the very end of the proposed language, referring to "you
12 should award the amount of zero dollars."

13 THE COURT: Yes.

14 MR. CABRAL: "Which is known as nominal damages."

15 THE COURT: Yes.

16 MR. CABRAL: I think, generally speaking, the award of
17 nominal damages is the proper standard there. But in terms of
18 zero dollars, Section 284 requires that a reasonable royalty be
19 awarded, so I am not sure zero dollars is accurate.

20 We would propose striking out the language "the amount
21 of zero dollars" and just have the language read, "if you find
22 that the plaintiff has not carried its burden, you should award
23 nominal damages."

24 THE COURT: I don't think that's correct. I think
25 where the plaintiff hasn't carried its burden, zero is the

EAO8ADRF

1 right amount. Because what that indicates is they don't have a
2 basis to calculate damages, but they are still informed to
3 determine infringement. So I will leave it as is on nominal
4 damages, but I accept your other two changes.

5 Let's hear from defense counsel.

6 MR. EDERER: With respect to the first proposed
7 change, we don't have a problem with that one. That's just the
8 changing of one word in the first sentence.

9 We do, however, have an issue with the second sentence
10 that has been added. I think that may carry the suggestion
11 that there is sufficient or could be sufficient evidence in the
12 record. I think that needs to be tied -- if it's going to be
13 delivered at all, I think it needs to be tied to the burden.
14 In other words, the burden still remains. Standing alone that
15 sentence suggests that you can ignore expert testimony and that
16 there may be sufficient evidence in this record separate and
17 apart from expert testimony. I think that has to be coupled
18 somehow with a reminder that the burden is still to be carried.

19 THE COURT: I hear what you're saying. I will get to
20 that in a second. I agree with that. I will make a change
21 along those lines.

22 Anything else?

23 MR. EDERER: No, your Honor.

24 Well, yes. In the last sentence, I think to be
25 complete and consistent with the jury instructions, where it

EAO8ADRF

1 says "but has nonetheless has proved infringement," I think
2 there should be some reference at that point to invalidity as
3 well.

4 THE COURT: The reason I did that is they wouldn't
5 have gotten to damages if they hadn't rejected your claims of
6 invalidity.

7 All right. Let me hear from my law clerk where we are
8 at the moment, and then I am going to add a sentence reflecting
9 the other point you made.

10 LAW CLERK: You wanted me to read the rest of it?

11 THE COURT: Read the whole thing from the beginning
12 including the sentence that I have added so far.

13 LAW CLERK: "To the jury:

14 "Although the plaintiff's damages expert testimony was
15 stricken, plaintiffs did introduce documentary evidence bearing
16 on damages. More generally, while expert testimony may be
17 considered on the issue of damages, it is not necessary for
18 there to be expert testimony on the issue of damages if there
19 is sufficient other evidence on the issue of damages."

20 THE COURT: There is sufficient evidence to satisfy
21 the plaintiff's burden on damages. That's the point that was
22 just being made.

23 Keep going.

24 LAW CLERK: "In addition, defendants' expert
25 calculated what he believed would be reasonable damages if

EAO8ADRF

1 infringement was found."

2 THE COURT: OK. If infringement of a valid patent
3 claim or claims was found.

4 LAW CLERK: OK. "In determining damages, even though
5 plaintiff bears the burden of proof, you can still consider all
6 evidence including any evidence introduced by the defendants.
7 Finally, if you find in the end that, even taking account of
8 all the evidence, plaintiff has not carried its burden as to
9 any amount of damages but has nonetheless proved infringement,
10 you should --"

11 THE COURT: Proved infringement of a valid claim or
12 claims.

13 LAW CLERK: "You should award the amount of zero
14 dollars, which is known as nominal damages."

15 THE COURT: OK. Good. I think that is a print, as
16 they say.

17 So I will have my law clerk type it up nicely, put at
18 the bottom Judge Rakoff, send it into the jury, have a copy
19 made for each side and also a copy marked as a court exhibit.

20 Anything else we need to take up now?

21 MR. CABRAL: Nothing from plaintiff.

22 MR. EDERER: No, your Honor.

23 THE COURT: Very good. Thanks so much.

24 (Recess pending verdict)

25 (Jury not present; time noted: 3:55 p.m.)

EAO8ADRF

1 THE COURT: I want my law clerk to please read the
2 plaintiff's note.

3 LAW CLERK: "To the judge: Requesting Ned Barnes
4 report evidence, DTX 787, and calculator, and James Hilt's
5 testimony."

6 THE COURT: All right. If it's in evidence, they
7 should have it.

8 THE DEPUTY CLERK: It's not in evidence.

9 THE COURT: Then they can't have it.

10 They can have, obviously, the testimony and they can
11 have a calculator.

12 There is a calculator down at chambers.

13 THE DEPUTY CLERK: I already have one, Judge. I have
14 got the calculator. I have got nine copies of the testimony.

15 THE COURT: Great. Let's send that in. And to speed
16 things up, unless any counsel disagrees, I will just have my
17 courtroom deputy tell them, when the other items are brought
18 in, that the exhibit they mentioned is not in evidence.

19 THE DEPUTY CLERK: OK. Are we going to refer to the
20 Barnes report?

21 THE COURT: I'm sorry. Read me the note one more
22 time.

23 LAW CLERK: "Requesting Ned Barnes report evidence,
24 DTX 787."

25 THE COURT: That seems to be a request for that

EAO8ADRF

1 exhibit, right? Or you think it is a request for his
2 testimony?

3 THE DEPUTY CLERK: You are absolutely.

4 THE COURT: Let me hear from counsel.

5 MR. CABRAL: We agree with that interpretation.

6 THE COURT: So just to move things along, we will take
7 in the calculator and the Hilt testimony and my courtroom
8 deputy will just tell them that the other item is not in
9 evidence.

10 Anything else we need to take up now?

11 MR. CABRAL: Not from plaintiff.

12 MR. SHARIFAHMADIAN: Not from defendant.

13 (Recess pending verdict)

14 (Adjourned to October 27, 2014, at 9:00 a.m.)
15
16
17
18
19
20
21
22
23
24
25